



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 19 OF 2018

DAVID NTHIGA.....PLAINTIFF

VERSUS

JOHN NJERU MBUGI (*Sued as an administrator*

***Of the Estate of Mbugi Matata – Deceased*)..... DEFENDANT**

RULING

1. By a notice of motion dated 19th September 2018 and amended on 18th October 2018 brought under the provisions of **Order 40 Rule 1 (a) & (b) of the Civil Procedure Rules (hereinafter *the Rules*) and sections 1A and 3A of the Civil Procedure Act (Cap 21)** the Plaintiff sought the following orders;

- a. That this application be certified as urgent and be heard *ex-parte* in the 1st instance and the service of the same be dispensed with in the first instance.
- b. That this honourable court do issue an order of temporary injunction restraining the Defendant/Respondent his agents, servants, employees from entering, trespassing, cutting down any trees, building, shooting arrows at the Plaintiff and his workers or any other manner whatsoever interfering with *land parcel No. Evurore/Nguthi/1265* until the hearing of this suit or other further orders of this court. (sic)
- c. This honourable court do issue an order of permanent injunction restraining the Defendant/Respondent, his agents, servants, employees from entering, trespassing, cutting down any trees, buildings, shooting arrows at the Plaintiff and his workers or any other manner whatsoever interfering with *land parcel No. Evurore/Nguthi/1265* until the hearing and determination of this suit or until further orders of this court.
- d. The court do make such further orders as may meet the ends of justice in this matter.
- e. Costs of this application be provided for.

2. The said application was based upon the grounds set out on the face of the motion. It was contended that the Defendant had taken steps to interfere with the Plaintiff's possession of *Title No. Evurore/Nguthi/1265* (hereinafter the *suit property*) through physical invasion, threats, and commencement of construction upon the suit property. The Plaintiff contended that he would suffer irreparable damage unless some interim orders are granted in his favour.

3. The said application was supported by an affidavit sworn by the Plaintiff on 19th September 2018 in which he reiterated and expounded upon the grounds set out in the motion. It was contended that even though the Plaintiff has been in occupation of the suit property, since 1980, upon filing the originating summons dated 20th June 2018 claiming adverse possession the Defendant and his agents violently invaded the suit property deposited building materials thereon and embarked upon excavating a foundation. The Defendant was also said to have shot arrows at the Plaintiff's workers and injured at least one of them. The Plaintiff, therefore, wanted an interim measure of protection pending the hearing and determination of the main suit.

4. The Defendant filed a replying affidavit sworn on 16th January 2019 in opposition to the said application. The Defendant appeared to respond mainly to the originating summons for adverse possession rather than the interim application for injunction. The Defendant did not respond to the Plaintiff's specific factual allegations contained in the application. He did not controvert the Plaintiff's allegation on invasion of the suit properties, depositing of building materials or visiting violence on the Plaintiff's workers. The Defendant simply averred that the Plaintiff had not satisfied the principles for the grant of an injunction as set out in the case of **Giella Vs Cassman Brown & Co Ltd [1975] EA 358**.

5. When the said application was listed for hearing on 15th October 2018 it was directed that the application be canvassed through written submissions. The parties were to file and exchange written submissions within 30 days upon service of the affidavits the parties were granted leave to file. The record shows that the Plaintiff filed his written submissions on 26th November 2018 but there was no indication of the Defendant having filed any by the time of preparation of the ruling.

6. The court has considered the Plaintiff's said application, the Defendant's replying affidavit in opposition thereto as well as the Plaintiff's submissions on record. The court has also borne in mind the principles set out in the case of **Giella Vs Cassman Brown & Co Ltd** (supra). The court notes that the factual foundation of the Plaintiff's application has not been challenged. The Plaintiff has evidently been in possession of the suit property for a very long time. There is no doubt that the Defendant has recently invaded the suit property with a view to undertaking construction thereon after the filing of the claim for adverse possession.

7. The court has no doubt that the Defendant is trying to steal a march upon the Plaintiff through dubious and unlawful means. By his actions, he is trying to undermine the Plaintiff's claim for adverse possession by attempting to change the *status quo*. The court cannot countenance such conduct on the part of a litigant. He must be stopped in his tracks.

8. On the basis of the material on record, the court is satisfied that the Plaintiff has demonstrated a *prima facie* case with a probability of success at the trial. The court is further satisfied that unless an interim injunction is granted, the Plaintiff might otherwise suffer irreparable damage. The Defendant's interference with the Plaintiff's possession may violate his security and dignity which violations may not be easily compensatable in monetary damages. Even if the court were to consider the balance of convenience, the same would still tilt in favour of the Plaintiff. He is currently in possession and has been in possession for a long period of time. It would cause greater hardship to the Plaintiff by denying him an interim order than any hardship the Defendant may suffer by granting the injunction.

9. The upshot of the foregoing is that the court finds merit in the Plaintiff's notice of motion dated 19th September 2018 and amended on 18th October 2018. The court, however, shall not grant the permanent order of injunction sought because such order can only be granted upon conclusion of the suit when the rights of the concerned litigants have been determined with finality. Accordingly, the court makes the following orders;

a. An interim order of injunction be and is hereby issued restraining the Defendant either by himself, his servants or agents from entering, cutting down trees, undertaking any construction or from howsoever interfering with the Plaintiff's possession of *Title No. Evurore/Nguthi/1265* until the hearing and determination of the suit.

b. An interim injunction be and is hereby issued restraining the Defendant either by himself, his servants or agents from howsoever threatening or visiting any form of violence upon the Plaintiff and his servants or agents on the suit property until the hearing and determination of the suit.

c. Costs of the application shall be in the cause.

10. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **13TH** day of **MARCH 2019**.

In the presence of Mr. Okwaro holding brief for Ms. Kithaka for the Plaintiff and Ms. Kung'u holding brief for Ms. Ndongoro for the Defendant.

Court clerk: Muinde

Y.M. ANGIMA

JUDGE

13/3/2019